No. 92-1703

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In the Supreme Court of the United States

OCTOBER TERM, 1992

MICHAEL J. NEWMAN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether clear error was the proper standard for review of the district court's conclusion that the victim's injuries to his inner ear and head, which led to several days of hospitalization, resulted in "impairment of a function or a bodily member" and "requir[ed] * * * hospitalization," so as to fall within the definition of "serious bodily injury" set forth in Sentencing Guidelines § 1B1.1(j).

2. Whether petitioner's sentence amounted to an impermissible double penalty for the same conduct because the district court's determination that petitioner's conduct caused "serious bodily injury" led to both a determination that the conduct constituted an aggravated assault and an increase in the offense level because of the nature of the injury.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1-21) is reported at 982 F.2d 665.

JURISDICTION

The judgment of the court of appeals was entered on December 31, 1992. A petition for rehearing was denied on January 22, 1993. Pet. App. 23. The petition for a writ of certiorari was filed on April 22, 1993. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the District of Rhode Island, petitioner was convicted of depriving a pretrial detainee of his rights under color of law, in violation of 18 U.S.C. 242. He was sentenced to 60 months' imprisonment. The court of appeals affirmed. Pet. App. 1-21.

1. On October 6, 1990, Daniel Peterson was arrested in Providence, Rhode Island, for drinking in public. A record check by police revealed that there were outstanding warrants against him. Petitioner was the officer assigned to the cell block where Peterson was detained. After being placed in a cell, Peterson began to yell and scream. At one point, he picked up the porcelain toilet in his cell and threw it into the bars. When petitioner and another officer attempted to remove Peterson to another cell, he resisted. The officers handcuffed his wrists to the cell bars after moving him. See Pet. App. 2.

After the officers left, Peterson began yelling again. Petitioner returned alone to Peterson's cell. While Peterson was handcuffed to the cell bars, petitioner beat and kicked him in the stomach and head. Peterson sustained injuries to his face, nose, eyes, and inner ear as a result of the beating; subsequently, he experienced difficulty in breathing. He was hospitalized for a week. See Pet. App. 2-3.

2. Under Sentencing Guidelines § 2H1.4(a)(2), the offense level for interference with civil rights under color of law is six levels above the level for the underlying offense. Because the court determined that the underlying conduct involved serious bodily injury, the court treated the underlying offense as an aggravated assault pursuant to Application Note 1 to

Sentencing Guidelines § 2A2.2, which resulted in a base offense level of 21. The court then adjusted the offense level upward four levels under Sentencing Guidelines § 2A2.2(b)(3)(B), because the aggravated assault resulted in serious bodily injury. See Pet. App. 12.

3. The court of appeals affirmed. Pet. App. 1-21. The court first rejected petitioner's contention that the sentencing court erred in determining that the offense involved serious bodily injury. Pet. App. 12-14. The court noted that a "plain error" standard of review might be appropriate, because petitioner apparently had conceded the propriety of the base offense level in the district court. The court went on, however, to consider the question based on its view that it would not reverse even if petitioner had preserved the claim. *Id.* at 13 n.7. The court accepted petitioner's characterization of the question whether the injuries involved "serious bodily injury" as "a mixed question of law and fact." *Id.* at 12. The court then determined that "the pivotal question addressed by the sentencing court—whether the victim's injuries were sufficiently extensive to constitute 'serious bodily injury'—called for a fact dominated evaluative judgment" that should be reviewed for clear error. *Id.* at 22. Applying the clear-error standard, the court of appeals affirmed the district court's finding that petitioner's assault caused Peterson serious bodily injury as defined by Section 1B1.1 of the Sentencing Guidelines. Pet. App. 14.

The court of appeals also rejected petitioner's claim that the district court engaged in impermissible "double counting" by using the "serious bodily injury" finding both to justify treating the

offense as an aggravated assault and to justify a four-level enhancement under Sentencing Guidelines § 2A2.2(b)(3)(B) to reflect the extent of the victim's injuries. Pet. App. 15-21. As with petitioner's other claim, the court noted that petitioner raised the claim for the first time on appeal, but nevertheless proceeded to address the claim on the merits. *Id.* at 15. The court first noted that the sentence imposed by the district court was "in exact accordance with the plain language of the applicable sentencing guidelines." *Id.* at 16. The court also commented that closely related sections of the Sentencing Guidelines contained provisions expressly preventing double use of particular conduct and concluded that the absence of such a provision from the relevant provisions in this case strongly supported application of the literal terms of the Sentencing Guidelines. *Id.* at 19-20. Accordingly, the court of appeals affirmed. *Id.* at 20-21.

ARGUMENT

Petitioner argues that the district court improperly concluded that his conduct inflicted "serious bodily injury," and that the district court's use of the "serious bodily injury" finding resulted in impermissible double counting. Whatever the merits of those claims, the court of appeals concluded that neither of them was properly preserved in the district court (Pet. App. 13 n.7, 15), and thus this case does not present an appropriate vehicle to consider either claim. In any event, both of petitioner's claims are meritless.

1. Petitioner's principal contention (Pet. 9-17) is that the court of appeals erred in applying a "clear-error" standard of review to the question whether the injuries his conduct caused constituted a "serious

bodily injury" for purposes of the Sentencing Guidelines.

As petitioner notes (Pet. 9), the standard of review is established by 18 U.S.C. 3742(e), which provides that the "court of appeals * * * shall accept the findings of fact of the district court unless they are clearly erroneous and shall give due deference to the district court's application of the guidelines to the facts." Although that provision by its terms carries forward the traditional rule that findings of fact are reviewed for clear error, see *Anderson* v. *City of Bessemer City*, 470 U.S. 564, 573-575 (1985), and by implication carries forward the traditional *de novo* standard of review for pure questions of law, see *Braxton* v. *United States*, 111 S. Ct. 1854, 1858-1859 (1991), it does not on its face address the standard of review applicable to mixed questions of law and fact. The language of the statute requiring "due deference to the district court's application of the guidelines to the facts" suggests that in the sentencing context appellate courts should defer more readily to district court conclusions on mixed questions of law and fact than they would in other settings. That approach is not only consistent with the language of Section 3742(e), but also accords with Congress's overall intention to limit the statute's intrusion on the traditional rule restricting appellate review of sentencing questions.

The courts of appeals that have addressed the question generally have concluded that the proper approach is to attempt to isolate the legal and factual issues presented by a particular challenge, and to apply "clear error" review to challenges to determi-

nations that are "essentially" factual.[1] Petitioner has not identified any case that is inconsistent with that approach.[2] The decision of the court of appeals in this case—applying "clear error" review to a question calling for "a fact dominated evaluative judgment," Pet. App. 22—is well within the boundaries of that approach.

Contrary to petitioner's suggestion (Pet. 12-13), there is no basis for supposing that the First Circuit's practice in this area is out of line with the practice of the other courts of appeals. The First Circuit's leading case in the area, *United States* v. *Wright*, 873 F.2d 437 (1989) (criticized by petitioner at Pet. 12-13), states that some mixed questions of law and fact should be reviewed *de novo*, and that others should be reviewed only for clear error, with the dividing line between the two "turn[ing] on a determination that, as a matter of the sound administration of justice, one judicial actor is better positioned than another to decide the issue in question." *Id.* at 443 (quoting *Pierce* v. *Underwood*, 487 U.S. 552, 559-560 (1988)). Applying that analysis to Section 3742(e), the

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[1] See *United States* v. *Wright*, 873 F.2d 437, 444 (1st Cir. 1989); *United States* v. *Chartier*, 970 F.2d 1009, 1015 (2d Cir. 1992); *United States* v. *Rosen*, 896 F.2d 789, 790 (3d Cir. 1990); *United States* v. *Daughtrey*, 874 F.2d 213, 217 (4th Cir. 1989) (quoting *United States* v. *McConney*, 728 F.2d 1195, 1202 (9th Cir.) (en banc), cert. denied, 469 U.S. 824 (1984)); *United States* v. *Jordan*, 890 F.2d 968, 972 (7th Cir. 1989); *United States* v. *Williams*, 890 F.2d 102, 103 (8th Cir. 1989); *United States* v. *Carvajal*, 905 F.2d 1292, 1295 (9th Cir. 1990); *United States* v. *Williams*, 966 F.2d 555, 558 (10th Cir. 1992).

[2] The cases cited at Pet. 13 n.6 stand for the uncontested propositions that legal questions receive *de novo* review and that findings of fact are reviewed for clear error.

court, like the majority of the courts of appeals, determined that clear error review was appropriate for "essentially factual" determinations of the sentencing court. 873 F.2d at 444.[3]

Accordingly, the dispositive question in this case is whether the court of appeals correctly determined that petitioner's claim attacked "fact dominated" determinations of the district court. As petitioner explains (Pet. 11 n.4), he challenged the sentencing court's view that the injuries he caused resulted in "impairment of a function or a bodily member" and "required * * * hospitalization" for purposes of Sentencing Guidelines § 1B1.1, Application Note 1(j).[4] It was entirely reasonable for the court of appeals to characterize the sentencing court's resolution of those matters as essentially factual. Compare *United States* v. *Lanzi*, 933 F.2d 824, 827 (10th Cir. 1991) (clear-error review for determination whether particular injuries were "painful and obvious, or * * * of a type for which medical attention ordinarily would be sought," within the meaning of Sentencing

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[3] Petitioner notes (Pet. 12) that the First Circuit stated in *United States* v. *Pilgrim Market Corp.*, 944 F.2d 14, 17 n.2 (1991), that the courts of appeals are not entirely in agreement regarding what standard of review to apply to the decision that counts should be grouped together for sentencing purposes. But any lack of agreement simply reflects the fact that it is difficult to separate the legal and factual components of that question; in any event, that question is not presented in this case.

[4] Hence, the summary of petitioner's challenges offered by the petition makes it clear that this case does not involve the meaning of the term "serious," which the Third Circuit determined to present a legal question in *United States* v. *Inigo*, 925 F.2d 641 (1991), cited at Pet. 15.

Guidelines § 1B1.1, Application Note 1(b)).[5] Especially in light of petitioner's apparent failure to present his challenge properly in the district court (see Pet. App. 13 n.7), there is no occasion for review by this Court.

2. Petitioner also contends (Pet. 18-20) that the district court's sentence rested on impermissible double counting because it relied on the "serious bodily injury" his conduct caused both to determine that his offense was an aggravated assault as described in Application Note 1(b) to Sentencing Guidelines § 2A2.2, and to enhance the offense level under Sentencing Guidelines § 2A2.2(b)(3)(B). Putting to one side petitioner's failure to raise the claim in the trial court (see Pet. App. 15), the claim is meritless. It is not appropriate for district courts to decline to apply the provisions of the Sentencing Guidelines establishing offense levels based on the view that application of a provision as written would amount to double counting. On the contrary, the "Guidelines are explicit when double counting is forbidden," and thus "[a]n adjustment that clearly applies to the conduct of an offense must be imposed unless the Guidelines expressly exclude its applicability." *United States* v. *Williams*, 954 F.2d 204, 207-

[5] Contrary to petitioner's suggestion (Pet. 10), the Eighth Circuit's decision in *United States* v. *Yankton*, 986 F.2d 1225 (1993), is not to the contrary. The court in that case considered whether "pregnancy resulting from forcible rape can be considered a bodily injury" at all under the Sentencing Guidelines. Because the court determined that "the issue involves an interpretation of the scope of the guidelines," the court applied *de novo* review. *Id.* at 1229. The Eighth Circuit's characterization of the question at issue there does not suggest that it would treat questions like those at issue here any differently than the First Circuit did in this case.

208 (4th Cir. 1992). Petitioner does not dispute the court of appeals' conclusion that the literal terms of the Sentencing Guidelines refer to the "serious bodily injury" factor twice in calculation of the sentence for an offense such as petitioner's. Nor could he argue plausibly that the process established by the Sentencing Guidelines is irrational. Application Note 1(b) to Sentencing Guidelines § 2A2.2 establishes three separate types of conduct that constitute an aggravated assault, only one of which requires any bodily injury at all. Paragraph (b)(3) of the Guideline itself then establishes a table of sentencing enhancements to raise the offense level for an aggravated assault based on the gravity of any bodily injury that is inflicted. The dual use of the "serious bodily injury" factor does not render any portion of the scheme superfluous, because it is entirely possible for there to be an aggravated assault that does not result in serious bodily injury.

As petitioner points out (Pet. 18-19), some courts have ruled in certain circumstances that application of separate provisions of the Sentencing Guidelines that increase a defendant's sentence based on the same conduct results in impermissible double counting. See *United States* v. *Hudson*, 972 F.2d 504, 506-507 (2d Cir. 1992) (enhancement to defendant's offense level for assault with dangerous weapon was impermissible double counting because use of dangerous weapon also resulted in increase in offense level by causing crime to be defined as aggravated assault); *United States* v. *Romano*, 970 F.2d 164, 166-167 (6th Cir. 1992) (district court erred in applying upward adjustments for being an organizer of criminal activity and for engaging in more than minimal

planning because more than minimal planning is required to qualify as an organizer). It is not clear, however, that those courts would reach a different result than the court of appeals did with respect to the particular provisions of the Sentencing Guidelines at issue in this case.

Even if there were a square conflict in the circuits on the question presented in this case, that conflict would not merit review by this Court because the Sentencing Commission has authority to resolve the question. The Court has made clear that the Sentencing Commission is responsible in the first instance for resolving conflicts among the courts of appeals concerning the proper application of the Sentencing Guidelines. In *Braxton* v. *United States*, 111 S. Ct. 1854, 1858 (1991), the Court observed that "Congress necessarily contemplated that the Commission would periodically review the work of the courts, and would make whatever clarifying revisions to the Guidelines conflicting judicial decisions might suggest." Consequently, the Court indicated that it will "be more restrained and circumspect in using [its] certiorari power as the primary means of resolving such conflicts." *Ibid.* Because the Commission may address the issue presented in this case, and has the authority to resolve it conclusively, there is no reason for the Court to grant review.[6]

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[6] The Court has denied other petitions this Term raising similar claims that double counting is generally not permitted under the Sentencing Guidelines. *Sanders* v. *United States*, No. 92-7954, cert. denied (June 7, 1993); *Ellen* v. *United States*, 113 S. Ct. 217 (1992).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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